SUPREME COURT, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1325

SALVATORE MONTELLO, JOHN FRANCIS RIPOLL, JAMES VINCENT SANTA MARIA, RONALD JAMES DE CONZA and ANTHONY FASANELLA,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray this Court for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

OPINION BELOW

The United States Court of Appeals for the Second Circuit by judgment entered on the 30th day of January, 1974 (Docket Nos. 73/2556; 73/2616) unanimously affirmed a judgment in the United States District

Court for the Eastern District of New York, convicting petitioners of Burglary, Larceny and Conspiracy, in violation of Title 18 United States Code, Sections 371, 2113 (a) and 2113 (b), after trial before District Judge Edward R. Neaher and a jury (Indictment No. 72 CR 951). The judgment was unanimously affrimed without opinion. There were no other opinions written in question with this case.

B.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on January 30, 1974, as aforesaid.

C.

THE QUESTIONS PRESENTED FOR REVIEW

1. Was the prosecution's witness's disregard of the oath sufficient to strike their testimony?

2. Was the curtailment of the summation deprivation of due process

and a right to counsel?

3. Did the trial court err in permitting the prosecutor to attack the character of petitioner Montello, although he did not take the stand?

4. Did the trial court err in denying Montello's motion to preclude introduction of his prior misdemeanor conviction in the event he testified on his own behalf?

5. Was the prosecutor's summation inflamatory and prejudicial?

6. Did the actions of the United States Marshals in the courtroom prejudice the petitioners defense?

7. Did the trial court improperly charge the jury with respect to accomplice testimony?

8. Did the trial court improperly receive evidence of threats allegedly attributable to petitioners?

D.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Constitutional provisions involved are the due process clause of the Fifth Amendment to the United States Constitution and the right to counsel clause of the Sixth Amendment to the United States Constitution.

2. The statutes involved are Title 18 United States Code, Sections 371, 2113 (a) and 2113 (b).

Each of the foregoing are set forth in pertinent part in Appendix A of this petition.

E.

A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Statement of the Case

Petitioners were indicted in the United States District Court in the Eastern District of New York, pursuant to a superseding indictment No. 72 CR 951, containing four counts. Count 1 charged petitioners with conspiring to burglarize the Manufacturers Hanover Trust Co. on Northern Boulevard, Queens County. Count 2 and 3 charged that petitioners committed burglary and larceny. The 4th count relates only to other

defendants in respect to possession of the proceeds of the burglary. Petitioners were not named in count 4.

Trial was held before Judge Edward R. Neaher and a jury, and continued during the month of July, 1973 until the verdict of the jury convicting petitioners as charged.

On or about September 21, 1973 petitioners were sentenced to varying prison terms on each of the counts, said sentence to run concurrently. Petitioners are presently at liberty pending further application to this Court for continuance of their bail.

## STATEMENT OF FACTS

The pertinent facts relating to petitioners are set forth at length under the respective Points and, accordingly, are not reiterated herein in essence, however, the petitioners were convicted exclusively upon the testimony of two alleged co-conspirators, who testified as to the formation of the alleged conspiracy and the manner by which the bank burglary was ultimately carried out.

## F.

## BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court below was invoked upon the grounds that the crimes charged were in violation of

Federal law, to wit, the aforesaid sections of Title 18 United States Code.

## G.

## ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

### POINT ONE

### THE COURT BELOW ERRED IN NOT GRANTING APPELLANT'S MOTION TO STRIKE AS UNSWORN THE TESTIMONY OF THE PROSECUTION'S PRINCIPAL WITNESSES, CONDON AND DENISCH, WHO REPUDIATED AND DENIED THE SANCTITY OF THEIR OATH.

As previously indicated, the conviction of all petitioners rested exclusively upon the testimony in behalf of the prosecution of two alleged co-conspirators, namely, Dennis Condon and Robert Denisch.

Each was cross-examined with respect to the taking of their oaths and their regard for the oath.

The following appears in the trial record of Condon's cross-examination:

> "Q. Mr. Condon, you took an oath to tell the truth so help you God, didn't you? A. Yes, sir.
> "Q. What does that oath mean to you? A. That is requires of me that I tell nothing but the truth.
> "Q. And what happens if you don't tell the truth? A. I should be indicted for perjury.
> "Q. And is it your testimony that you are telling the truth because you don't want to be indicted for perjury? Am I right? A. I'm telling the truth

as I remember it, yes, sir.
"Q. Is it your understanding that if you don't tell the truth, you might be indicted for perjury; right? A. Yes, sir.
"Q. And if you are indicted for perjury, there is a possibility of being convicted and going to jail; right? A. Yes, sir.
"Q. And is that the only reason that you are telling the truth, because you say it's the truth and you don't want to be indicted for perjury with the possible effect that you might go to jail? A. The reason that I'm telling the truth is to make my peace with the Government and to try and start all over again.
"Q. And those are the reasons that you are telling the truth? A. Yes, sir.

"Mr. Lewis: Now, at this time, your Honor, please, I either move to strike the testimony or to have your Honor deem his testimony to be unsworn. He does not appreciate the significance of taking an oath. There is far more to it than the possibility of corporal punishment in the nature of an indictment by the District Attorney.
"He called upon the Lord to bear witness to the fact that he's telling the truth. And I respectfully submit to your Honor he doesn't understand the-appreciate the consciousness of taking an oath and calling upon the Lord to bear witness on that obligation.
"There is more to it than just punishment for perjury.
"The Court: Motion denied.
"Mr. Lewis: Respectfully except." (Emphasis added.)

A similar cross-examination ensued with respect to Denisch. His testimony on that point appears in the record as follows:

"Q. And do you have any fears of any retribution from the Almighty if you tell a lie under oath? A. If I have any fears from God?
"Q. Yes. A. If I lie? I don't know.
"Q. Well, did the phrase, 'So help me, God,' mean anything to you? A. That I was swearing by God.
"Q. Did you expect to be punished if you didn't tell the truth by the Lord? A. No."

********

"Mr. Lewis: I move at this time, if your Honor please, in view of the last answer by this gentleman, that his testimony be deemed to be unsworn testimony.
"The Court: Denied.
"Mr. Lewis: Respectfully except." (Emphasis added.)

This Court recently had occasion to set forth its views respecting the sanctity and necessity of an oath genuinely taken as opposed to one taken pro forma. In Application of Griffiths, U.S. 37, L Ed 2d 910, 93 S.Ct. (1973), Mr. Justice Powell wrote at 37 L. Ed. 2d 918:

"....and Connecticut may quite properly conduct a character investigation to insure in any given case 'that an applicant is not one who "swears to an oath pro forma while declaring or manifesting his disagreement with or indifference to the oath"' Bond v. Floyd, 385, U.S. 115, 132 [17 L. Ed. 2d 235, 87 S. Ct. 339]"

See, also:

In re Bennett, 223, F. Supp. 423, 427

U.S. v. Looper, 419 F. 2d 1405, 1407

U.S. v. Miller, 236 Fed. 798, 799

U.S. v. DeSisto, 329 F. 2d 929, 934

U.S. v. DeFiore, 443, F. 2d 112, 115

Since Condon and Denisch made clear that neither felt himself bound by the oath in the sense in which it is, and for centuries has been, regarded as a "requisite" for "all testimonial statements made in court" (U.S. v. Fiore, supra), petitioner's motion to strike the "testimony" as unsworn should have been granted.

## POINT TWO

### THE TRIAL JUDGE'S UNREASONABLE LIMITATION WAS AN ABUSE OF DISCRETION THAT DEPRIVED APPELLANT OF HIS RIGHT TO FULLY AND FAIRLY PRESENT HIS DEFENSE.

Counsel for appellant was the last defense attorney to speak, and it had been agreed among defense counsel that he would act as "anchor man" for all. Counsel began his summation by telling the jury of his role:

> "Now, I am the last man, and I don't know whether you are going to say that is good or not, but it is my job as the anchor man now, to tie up all the loose ends. I am the only real person that is going to go into depth on the record in the case. *** I am stripping it down to the very bare bones."

No time limitation was placed on counsel before he began his summation.

After counsel had been speaking for one hour he requested a short recess and the following occurred.

> "The Court: I was just about to remind you that you have five more minutes.
> " Mr. Lewis: I do not see why you are curtailing my summation.
> "The Court: You have exceeded everyone else's.
> "Mr. Lewis: I am the anchorman; it's understood.
> "The Court: I am sorry, Mr. Lewis, you have five more minutes.
> "Mr. Lewis: You are not permitting me to do what I should do - you haven't given me a time limit, your Honor.
> "The Court: You have had more than ample time

to set forth what you want to say. Other counsel did it in one hour and ten minutes.

"Mr. Lewis: Others have done it longer.

"The Court: I have kept the time, Mr. Lewis.

"Mr. Lewis: Don't get angry. I am telling you that you should have told me before I started and I would have cut some of the things out. Don't leave me in a hole now. I don't think it's right.

"The Court: I'm sorry, Mr. Lewis. You have five more minutes.

Counsel was taken completely by surprise; there was no prior time allocation schedule as in Butler v. United States, 317, F. 2d. 249, 257, cert. denied 375 U. S. 838, and no agreement or acquiescence of counsel in a stated allotment of time as in Capriola v. United States, 61 F. 2d 5, 11 cert. denied 287, U. S. 671, and United States v. Mills, 366 F. 2d 512, 515.

Mr. Lewis abided by the court's ruling and noted his exception to the court's unexpected curtailment of his summation. He made the following statement for the record:

" I at this time move for a severance on the ground that my client was denied the effective aid of counsel, that my summation was abruptly terminated by the Court, that the defense counsel had met yesterday to decide I was going to be the anchor man and I was going to take a period of two hours, which would also encompass the reading of the record, which nobody else did. That there was no time limitation set by the Court, and that if you had told me before I got up that I was going to have no more than an hour and ten minutes or an hour and fifteen minutes, a lot of the material that I read I wouldn't have read, because I had

other pertinent information pertaining to my client that I had saved for the balance of my summation, and I think the abrupt termination of my summation deprived my client of due process and of his day in court."

The trial judge denied the motion on the grounds that counsel "had been speaking for an hour and ten minutes, which was as long as the longest counsel in the case," and that "so far as your two-hour allotment is concerned, the Court was not informed of any such agreement. ***I certainly do not think I would have permitted you two hours under the circumstances."

Appellants' counsel again empasized what he felt to be the fundamental unfairness in the court's ruling:

> " Mr. Lewis: May I say this: You didn't tell me before I got up that I had a certain period of time. What if these other counsel spoke for thirty minutes, would I be bound by that, too?
> " The Court: I am not going to answer a hypothetical question." (Emphasis added.)

Counsel for the other petitioners joined in the motion "in view of the fact that part of Mr. Lewis's summation was to encompass matters that other individual defendants would have relied on as well."

At the end of a four-week trial involving multiple defendants charged with conspiracy and other crimes where much testimony was admitted against only some of the defendants and not against others, it was not unreasonable for counsel, as the "anchor man", to prepare his summation in the expectation that he would be permitted more than just one hour

in which to sort out the evidence, "going into the depth on the record," attack the credibility of the government's two principal witnesses and "tie up all the loose ends." Particularly, since the court had not imposed any time limitation in advance for the summations and counsel had no way of knowing that the court had arbitrarily determined to restrict him to the same amount of time as that used by counsel for the co-defendants.

What the court below overlooked is that justice does not run a marathon race but, rather, it proceeds at a pace that allows both sides full opportunity to present their case and to have the jury clearly understand each and every aspect of the trial and the evidence presented thereon. In the absence of a charge that counsel was becoming repetitious - and none was made here - the court should have permitted counsel to finish his prepared remarks. At the very least, it should have given him a reasonable time to do so and not merely five minutes.

The unreasonable curtailment of counsel's summation was an abuse of discretion which violated petitioners' right to a fair trial. (Capriola v. U.S., 61, F. 2d 5, 11, Cert. Den. 287 U.S. 671)

## POINT THREE

### THE TRIAL COURT IMPROPERLY PERMITTED THE PROSECUTOR TO ATTACK THE CHARACTER OF THE PETITIONER MONTELLO WHO NEITHER TESTIFIED IN HIS OWN BEHALF OR INTRODUCED EVIDENCE OF HIS CHARACTER

The previously mentioned witness for the prosecution, Dennis Condon, testified, over objection on direct examination that he spoke to an alleged co-conspirator, one Bollella (a co-defendant acquitted on the trial of the conspiracy charge) and told Bollella that he had been frequenting various establishments in the hope of finding persons to join him in committing burglaries and who knew about opening safes and vaults.

Condon was then permitted, over objection, to state that he asked Bollella to introduce him to petitioner Montello.

Thus the damage was done. The prosecutor had developed for the jury that Condon had told Bollella of his search for "people who I believed engaged in burglaries" who could open "a safe or vault" ...."people with this type of knowledge", and that during one such conversation had asked Bollella to introduce him to petitioner Montello.

The inference was thereby unmistakably created for the jury that Montello, whose character was not in issue, was nevertheless a person engaged in burglaries.

Thereafter, on re-direct examination of Condon, the prosecutor

asked Condon if he was a burglar. Condon repled in the affirmative. The very next question the prosecutor put to Condon was "who vouched for you to Sonny Black [Montello]?"

Although, the court sustained an objection to the question, leaving it unanswered, its effect was plain to see. Motions for mistrial were nonetheless denied with an admonition to the jury to disregard the question.

The question, following on the heels of the answerjust given, clearly implied that Condon - a burglar - required a recommendation from some criminal source in order to induce Montello to enter into a criminal relationship with him. Put another way, the question presupposed that Montello might not do business with Condon unless some reliable underworld source vouched for him. In short, the question implied that Montello was a member of the underworld.

The prosecutor's method finds no sanction in our law. To the contrary, the reported opinions condemn such an approach.

See, Michelson v. U.S. 69 S. Ct. 213, 335 U.S. 469, 475 (1949); U.S. v. James, 208 F. 2d 124, 125 (2 Cri., 1953).

## POINT FOUR

## THE TRIAL COURT ERRED IN DENYING MONTELLO'S APPLICATION TO PRECLUDE QUESTIONING HIM AS TO A PRIOR MISDEMEANOR CONVICTION IF HE TOOK THE STAND TO TESTIFY

During the trial; petitioner Montello requested the Court to preclude the Government from questioning him as to a prior misdemanor conviction in the event he testified in his own behalf.

The basic facts underlying the conviction were that Montello in 1963 was convicted after trial, of an attempted burglary, a felony, alleged to have occurred in 1962 - over ten years prior to the instant trial. On appeal, the New York State Court of Appeals reversed the conviction. In 1967, Montello pleaded guilty to a misdemanor of Unlawful Entry in satisfaction of the original attempted burglary charge in return for a sentence to the time served during the pendency of the appeal.

The trial court in this case denied the application holding that the conviction was not sufficiently remote in time and, further, involved moral turpitude. As a result of that ruling, Montello, who had no other convictions did not testify in his own behalf.

It is respectfully urged that the trial court abused its discretion in so deciding (U.S. v. Palumbo, 401 F. 2d 270 [2 Cir., 1963, cert. den. 349 U.S. 947]; Goddard v. U.S., 131 F. 2d 220 [5 Cir., 1942]; U.S. v. Puco, 453 F. 2d 539 [2 Cir., 1971]).

## POINT FIVE

## THE PROSECUTOR'S SUMMATION WAS INFLAMATORY AND PREJUDICIAL

During his summation, the prosecutor made the following improper comments:

> "...It is the last time you are going to hear from anyone in law enforcement to ask you to convict these defendants on the evidence in this case. It is the last time that you are going to hear anyone from the community interest that we have in this case..."

Counsel objected, and the Court in effect, sustained the objection with the admonition it delivered to the prosecutor. The purpose of the reference to "law enforcement" and the "community interest" are both quite apparent. They are thinly veiled attempts to call upon the jurors to align themselves with the prosecution as the only protectors of the community from whence the jurors are drawn, thereby to have the jurors sympathize with the prosecutor, their protector, and prejudiced them against the defendants. (Berger v. U. S. 295 U. S. 78 [1935]).

The prosecutor in commenting on what he alleged were contentions of two defense counsel stated:

> " How desperate can the defense get that they have to start charging matters like that."

Aside from putting the integrity of the office behind the testimony of

the witnesses, this also puts the integrity of the office behind an evaluation of the defense. A plethora of decisions have been handed down on the impropriety of placing the integrity of the prosecutor's office behind a witness or other commentary in summation. See U. S. v. Spangelet, 258 F. 2d 338 (2d Cir., 1958).

The Court recognized the impropriety of the comment with its statement after objection.

> "Mr. Ryan, Mr. Ryan, Mr. Ryan, I think enough has been said on that subject."

He repeated his appeal to community prejudice against the defendants when he stated "you know it is important to our system" in referring to the fact that this jury should not hesitate to convict. The Court in effect sustained this objection also when it commented that it would instruct the jury that they were to be guided by the evidence.

He made himself a witness and placed the integrity of his office behind the testimony of his witness when he stated in referring to his witness:

> "They got it from casing of the banks, and they got it from the burglaries, because that is the truth." (Emphasis supplied)

The Court again recognized the propriety of the objection when it stated that the jury is the one to determine who is telling the truth.

He continued on to place himself in the case as a witness when in referring to his two witnesses who were his entire case, he stated

> "As a matter of fact, people like Denisch and Condon would be more prone to have difficulty in recollection than the ordinary..."

The Court upon objection again admonished the prosecutor on his obligation to comment fairly.

He continued these procedures up to almost the conclusion of his summation when he stated at ( )

> "...and I think you have learned what it takes to try to convict burglars who burglarize a bank in the middle of the night. You know it better than anyone. I am sure you had no idea before you were selected as jurors, as to what it takes to convict burglars."

This brought a statement from the Court that it had nothing to do with the case after it was objected to.

All of the foregoing comments have been the subject of criticism by various courts. See U. S. v. Lamerson 457 F. 2d 371 (5th Cir., 1972).

The improprieties complained of at bar individually and collectively were recently condemned in United States v. Drummond, 481 Fed 2d 62 (2 Cri., 1973). The decision in Drummond, supra comments on such activities as bolstering witnesses' testimony, deprecating defenses, expressing personal opinions, guaranteeing credibility, etc. See also:

U.S.v. Benter, 457 F. 2d 1174 (2nd. Cir., 1972)
(epithets at the defendant)

Greenberg v. U.S. 280 F. 2d 472 (1st. Cir., 1960)
(personal belief)

U.S. v. Miller, 478 F. 2d 1315 (2nd Cir., 1973)
(fair to public interest in law enforecement)

U.S. v. Spangalet, 258, F. 2d 338 (2nd Cir., 1958)

## POINT SIX

### THE ACTIONS OF THE UNITED STATES MARSHALS IN THE COURT-ROOM UNFAIRLY PREJUDICED PETITIONERS BY LENDING CREDIBILITY TO THE GOVERNMENT WITNESSES

The main issue for the jury to resolve was whether or not to credit the testimony of the main Government witnesses, Denisch and Condon. Indeed the Court charged the jury that if they disbelieved these witnesses they should acquit the petitioners.

At one point in the trial the witness Denisch testified over objection that the feared for the safety of himself and his family when he testified against petitioners before the Grand Jury.

At another point in the trial a New York City detective called as a prosecution witness was permittted to testify over objection that he met prior to trial with a co-defendant, Robert Bollella (who was tried jointly with petitioners and convicted of possession of the proceeds of the burglary but acquitted of the conspiracy) and sought to induce Bollella to become a witness for the Government against petitioners in the instant case. The detective went on to testify, over objection that Bollella refused to cooperate with the saying he "would rather be alive in jail than dead as a witness".

Thus the Government offered testimony which, if believed, gave rise to an inference that petitioners were men who would resort to violence

to avoid exposure of their guilt. Whether or not the Government's proferred testimony should be believed was, of course, the prime issue in the case.

Since Denisch was in Federal custody during the trial, the court, to avoid prejudice to petitioners if the jury should learn of this, directed the marshals that Denisch was to be brought into the courtroom by the marshals and seated on the witness stand before the jury entered. When his testimony was concluded, the jury was to leave the courtroom first and then, in their absence, the marshals were instructed to escort Denisch out of the courtroom. While the witness was testifying, the marshals were directed to remain seated inconspicuously in the audience part of the courtroom.

A similar order was made with respect to Condon - and carried out accordingly.

However, with respect to Denisch, the marshals violated the court's order.

> Following the completion of the testimony of the Government witness, Denisch, two marshals who were in the rear of the courtroom burst through the railing through the well of the court, passing directly in front of the jury, and followed the witness out of a side door of the courtroom. This, of course, highlighted the threat allegedly made to the witness and gave credence to his testimony.

Although the court and the prosecutor both acknowledged that the

incident was an unfortunate one, motions for a mistrial were nonetheless denied.

The described actions of the marshals - whether misguided or not - were Governmental actions for which the Government must bear the responsibility. These actions were non-testimonial evidence improperly received in the physical presence of the jury and highly persuasive that Denisch's testimony should be accepted as true. The marshals - though not sworn witnesses became unsworn corroborative witnesses. See, Parker v. Gladden, 385 U.S. 363 ; 87 S.Ct. 468 (1966 ).

## POINT SEVEN

### THE TRIAL COURT IMPROPERLY EMPHASIZED THE NECESSITY FOR, AND SEEMINGLY ENDORSED THE GOVERNMENT'S USE OF, ACCOMPLICE TESTIMONY IN THIS PARTICULAR CASE

As previously noted, all of the evidence adduced against the defendants consisted of the testimony of the alleged accomplices Condon and Denisch. As a matter of law, of course, such testimony is inherently suspect and requires great scrutiny and caution by the jury in its evaluation. The court in its charge, however, nullified the effect of its instructions along such lines which are required by law, for the purpose of under - scoring to the jury the great pitfalls of accomplice testimony. Indeed, contrary to the mandate of the law, the court's charge seemed to clearly suggest to the jury that it should use extreme caution and hesitation not in accepting such testimony but in rejecting it. The court notwithstanding counsel's objection, instructed the jury:

> "In certain types of crime the Government, of necessity, is frequently compelled to rely on the testimony of self-confessed criminals, informants or accomplices. Otherwise, it would be difficult to detect or prosecute some wrongdoers and this is particularly true in a conspiracy-burglary case. The Government often has no choice in the matter. It must take the witnesses to the transactions as they are."

The statement "...This is particularly true in a conspiracy-burglary case", it is respectfully submitted, improperly prejudiced the

petitioners. The jury in effect was told that no better evidence than what they heard could reasonably be expected in this particular case and they would have to settle for that.

## POINT EIGHT

## THE COURT ERRONEOUSLY ALLOWED THE GOVERNMENT TO INTRODUCE EVIDENCE OF FEAR OF DEATH BY WITNESSES

Two witnesses, over objection, were permitted to present to the jury most inflammatory and shocking evidence of their fear of death at the hands of the defendants.

The alleged accomplice, Denisch, testified as to threats of death made by one or more of the defendants against the alleged accomplice, Condon, as well as to Denisch's own subjective fear of death. The trial court rejected the requests of defense counsel to prohibit such testimony upon the grounds that the prejudicial effect of such testimony far exceeded its probative value and was based only on a witness' state of mind.

Later in the case, in rebuttal, an investigating officer in the case, New York City Detective Rooney, was permitted to testify, over objection that at a time after the conspiracy had ended, the defendant Bollella (a police officer) had told him that the reason that Bollella was going to trial rather than to cooperate with the Government was that 'he would rather be alive in jail than dead as a witness, . This testimony, it is submitted, was improperly introduced because of its inflammatory nature and because the statement as allegedly made at a time conceded to be outside the scope of the conspiracy charged and was not in furtherance of the conspiracy. The Court's limiting instruction could not reasonably be expected to abate the prejudice quite naturally flowing from such evidence to the defendant

Ripoll and other co-defendants, see Bruton v. United States, 391 U.S. 123 (1968).

The two errors in allowing into evidence the fears of death of two witnesses, unsupported by any objective circumstances, were compounded by an impropriety on the part of the Government contrary to the rules of discovery, the doctrine of Brady v. Maryland, 373 U.S. 83 (1963) and basic accepted concepts of fair play.

Following the direct testimony of the Government's witness, Detective Rooney, defendant Bollella's counsel was given a certain report of Criminal Procedure. In his direct testimony the detective made no mention of any post-conspiracy statement by Bollella concerning fears of death at the hands of the defendants or anything else. Nor was any mention of such contained in any report provided to the defense. Indeed, on the contrary, the reports provided to the defense flatly stated that "no results were obtained" from Rooney's interview with Bollella. The defendant Bollella then testified in his own defense, giving some testimony concerning the same meeting at which Detective Rooney later claimed Bollella mentioned his fear of death. Under the guise of rebuttal, the Government put Detective Rooney back on the stand to testify to the death-fear conversation.

Had an accurate report been furnished to the defense, reflecting Detective Rooney's actual potential testimony, no testimony would have been adduced from the defendant Bollella which would have occassioned

Rooney's inflammatory 'rebuttal' testimony.

It is respectfully submitted that the defense should have been notified of the variance between the events reflected in the report (no results) and the detective's actual recollection (statements of fear of death). A rule to the contrary potentially-makes a sham of rule 16 and 18 U.S.C. § 3500. See e.g. United States v. Mele, 462 F2D 918 (2nd Cir. 1972).

## CONCLUSION

THE PETITION SHOULD BE GRANTED AND THIS COURT, IN THE EXERCISE OF ITS POWERS SHOULD REVERSE THE JUDGMENT OF CONVICTION

Respectfully submitted,

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## APPENDIX A

## CONSTITUTIONAL PROVISIONS AND STATUTES CITED

AMENDMENT V TO THE UNITED STATES CONSTITUTION

"no person shall*** be deprived of life, liberty or property without due process of law***"

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions the accused shall enjoy the right ***to have the Assistance of Counsel for his defence."

TITLE 18 U.S. CODE SECTION 2113 (a)

"Whoever enters ***any bank*** with intent to commit in such bank***any larceny***shall be fined no more than $5,000 or imprisoned not more than 20 years or both."

TITLE 18 U.S. CODE SECTION 2113 (b)

"Whoever takes and carries away, with intent to steal***any property or money or any other thing of value exceeding $100, belonging to, or in the care, custody, control, managment, or possession of any bank***shall be fined not more than $5,000 or imprisoned not more than 10 years or both***"

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No. 73-1325

MAY 10 1974

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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SALVATORE MONTELLO, JOHN FRANCIS RIPOLL, JAMES VINCENT SANTA MARIA, RONALD JAMES DE CONZA, and ANTHONY FASANELLA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ROBERT H. BORK,
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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The order of the court of appeals (Pet. App) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on January 30, 1974. The petition for a writ of

certiorari was filed on February 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the testimony of two government witnesses should have been stricken because they failed to recognize that they would be "punished * * * by the Lord" if they lied.

2. Whether the prosecutor's summation was so inflammatory and prejudicial as to deny petitioners a fair trial.

3. Whether the actions of United States Marshals guarding the key government witnesses prejudiced petitioners by enhancing the witnesses' credibility.

4. Whether the district court properly cautioned the jury as to the possible unreliability of accomplice testimony.

5. Whether the district court erred in allowing rebuttal evidence concerning government witnesses' fear for their own personal safety.

6. Whether petitioner Fasanella was denied the right to a full and complete summation.

7. Whether alleged character evidence relating to petitioner Montello, who did not offer testimony in his own defense, was improperly admitted.

8. Whether the district court erred in denying petitioner Montello's motion to exclude evidence of a prior conviction if he should testify.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted on three counts of an indictment charging burglary and conspiracy, in violation of 18 U.S.C. 371 and 2113(a). Petitioners Ripoll, Santa Maria, De Conza, and Fasanella were sentenced to five years' imprisonment on each count, the sentences to run concurrently. Petitioner Montello was sentenced to five years' imprisonment on counts one and three, and seven and one-half years' imprisonment on count two, the sentences to run concurrently. All petitioners' sentences were subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2).[1]

1. Evidence at trial showed that a branch of the Manufacturers Hanover Trust Company bank in Queens, New York, was burglarized on December 12, 1971. The burglary was discovered the next morning, when the assistant manager and a guard found that a large hole had been burned through the night deposit vault, the alarm system had been circumvented, and a small fire had occurred. The circumstances surrounding the burglary and theft of more than $130,000 from the vault suggested a well-organized, professional theft (Tr. 283-288, 308-312.)

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[1] Codefendant Robert Bollella was acquitted on count one of the indictment (conspiracy) and convicted on count four of the indictment, charging knowing and unlawful possession of $14,000 of the proceeds from the burglary. Codefendant Louis Montello was severed from the case when he became ill on the first day of trial (Tr. 367-372, 410-416, 429-430).

Seven months later, after he was implicated in another burglary, Robert Denisch, an employee of Holmes Protection, Inc., confessed to participation in this burglary. A former Holmes employee, Dennis Condon, made a similar confession a week later (Tr. 717-728, 763, 1935, 1943). Denisch and Condon agreed to cooperate with the government and testify against the codefendants in this case.

There were no non-accomplice witnesses to the burglary. The government's case against petitioners, consisting largely of the testimony of Denisch and Condon, showed that after an earlier series of burglaries not involving petitioners, Denisch and Condon, whose expertise in circumventing Holmes alarm systems made the burglaries possible, sought the advice of defendant Bollella as to engaging the services of a different burglary gang. Bollella arranged to introduce Condon to "Sonny Black" (petitioner Montello), and to vouch for Condon. (Tr. 340-360, 460-472, 1507-1509.)

According to the testimony, Montello subsequently met with Condon and Denisch. After satisfying himself as to their ability to defeat the alarm, Montello offered the services of his "crew," and discussed potential burglary targets and arrangements for splitting burglary proceeds. Petitioners Santa Maria and Ripoll arrived during the discussion and were introduced by Montello as his "two partners" (Tr. 480, 1509-1517, 1605-1606).

After making painstaking preparations for the venture, the group attempted a burglary of the Man-

ufacturers bank in early December 1971. Fearing their entry had been detected, the plan was aborted. One week later, Montello, De Conza, Santa Maria, Ripoll, Denisch, and Condon proceeded to the bank. On Montello's instructions, Santa Maria and Ripoll tried in vain to open the bank's rear door. De Conza then succeeded in opening it; he then entered the bank with Denisch, who disengaged the alarm system. After waiting long enough to assure that the entry had not been detected, Montello summoned Fasanella, who arrived within fifteen minutes (Tr. 582-585, 1591, 1605-1614).

Montello, Fasanella, and De Conza unloaded acetylene tanks from Condon's car. Denisch, Fasanella, De Conza, and Santa Maria entered the bank, while Ripoll, Condon, and Montello remained outside. Fasanella and De Conza burned a hole in the vault and, after extinguishing a small fire, removed the money bags and their equipment (Tr. 585-587, 1614-1619). The group proceeded in two cars to the home of petitioner Montello's brother Louis, where the proceeds were divided [2] (Tr. 589-591, 1621-1632).

2. Since the government's case was based in large part on the testimony of Denisch and Condon, the defense undertook an extensive assault on the credibility of these witnesses. Condon was cross-examined

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[2] The shares of Denisch and Condon were parcelled out in installments, apparently out of fear that their possession of large sums, and lavish spending, would draw suspicion to the gang. Neither ever received his full share of the proceeds. (Tr. 590-591, 656-677, 682, 1631-1668.)

for five days (Tr. 747-1454), Denisch for three days (Tr. 1733-2266). In their own behalf petitioners Montello, Santa Maria and Ripoll called various witnesses in support of their alibi defenses. Petitioner Fasanella contended that he was the victim of a deliberate false identification, and that the actual participant was a Frank Mele, who resembled Fasanella physically and had a similar description in F.B.I. reports (Tr. 1238-1242, 2240-2245, 2561, 2566).[3]

## ARGUMENT

1. Petitioners contend that the trial court should have stricken the testimony of the principal prosecution witnesses, Denisch and Condon, as unsworn. At issue is the witnesses' reluctance to state, on cross-examination, that they feared immediate divine reprisal if they should fail to tell the truth (Tr. 1138-1140, 2180-2182).[4]

While unsworn testimony is not admissible (see *United States* v. *Fiore*, 443 F. 2d 112, 114-115 (C.A. 2)), mere nonbelief in a deity does not render a witness incompetent to testify (*Gillars* v. *United States*, 182 F. 2d 962, 970 (C.A. D.C.)). Nor is a witness disqualified from testifying for failure "to invoke the belief as to divine retribution to follow false swearing as an inducement to tell the truth."

---

[3] Codefendant Bollella, not a petitioner herein, testified in his own defense, and on cross-examination admitted being Montello's business partner in the venture (Tr. 2926-2927).

[4] Pertinent excerpts from the cross-examination are set out at Pet. 6-8.

*United States* v. *Looper*, 419 F. 2d 1405, 1406, n. 2 (C.A. 4). So long as witnesses evidenced a sincere compulsion to tell the truth—which Denisch and Condon did—their testimony was not subject to exclusion. *United States* v. *Looper*, *supra;* 6 Wigmore, *Evidence*, § 1818 (3d ed.).[5]

2. Petitioners argue that the prosecutor's summation was so inflammatory and prejudicial as to deny them the right to a fair trial. Viewed against the totality of this lengthy and complex trial, the handful of isolated comments alleged to be improper lose their significance. Certainly the comments complained of in the petition (at 17-20) do not warrant reversal under the most stringent tests of fairness.

Following more than a day of defense summations which were punctuated by broadside attacks on the integrity of the government's witnesses and the prosecutor,[6] and appeals to the jurors' emo-

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[5] While this Court has intimated that the mere swearing of allegiance *pro forma* by one who disagrees with or is indifferent to the solemnity attached to an oath, may not satisfy a state's interest in ensuring undivided allegiance on the part of its legislators, *Bond* v. *Floyd*, 385 U.S. 116, 132, or members of the bar, *In re Griffiths*, 413 U.S. 717, 726, these principles do not render the testimony inadmissible in this case, when the witnesses made clear that they intended to testify to the truth.

[6] Denisch and Condon were referred to in defense summations as, *inter alia*, "moral lepers," "liars," "thieves," "neurotic," "psychotic," persons who "sold their souls for their freedom." (Tr. 3156, 3159, 3398.) The prosecutor was accused, among other things, of trying to convict petitioners so he could record them "on a chart in his office," of deliber-

tions,[7] the prosecutor initially sought to emphasize to the jury that they should take into account the public interest in rendering a guilty verdict should they be convinced on the evidence of the petitioners' guilt beyond a reasonable doubt. Upon objection by the defense, the court told the jury they would be instructed on these matters at the close of the case.[8] Thereafter, the prosecutor argued to the jury the reasons why they should believe Denisch and Condon, and indicated the inherent difficulty in proving a burglary committed without independent witnesses.

In none of the statements cited by petitioners did the prosecutor make himself a witness by introducing testimony not of record. In sum there was no prosecutorial conduct which would warrant reversal.

3. Petitioners contend that the actions of United

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ate fabrication, and of withholding evidence (Tr. 3160-3162, 3169, 3175-3176, 3415.)

[7] The trial transcript abounds with emotional appeals to the jury. For instance, Bollella's attorney concluded his summation by stating (Tr. 3193): "Let Robert Bollella leave this courthouse, go home to his family, let him resume his police career, let him marry Helen Preston." Nor did the defense miss any opportunity to inject into closing arguments its own appeals to patriotism (Tr. 3153) or community interest (Tr. 3434-3436).

[8] Later the court instructed the jury (Tr. 3523): "The case is important to the Government, since the enforcement of the criminal laws is required in the public interest. Obviously, it is equally important to the defendants, who are charged with a serious crime. Let me add: The fact that the Government is a party entitles it to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration."

States Marshals prejudiced them by lending credibility to the principal government witnesses, Denisch and Condon, who had been in protective custody throughout the trial. A procedure had been established whereby the witnesses would enter and leave the courtroom in the jury's absence, accompanied by the marshals, who sat inconspicuously in the public area of the courtroom during the trial.

This procedure worked without incident until the thirteenth day of trial, when upon concluding the redirect examination of Denisch, the prosecution, about to rest its case, excused the witness, who exited through a nearby door into the detention cell, and was followed by the marshals, in the presence of the jury (Tr. 2481). To have followed the established procedure would have required the jury to leave the courtroom while Denisch was escorted out, then return only to hear the prosecutor announce that he was resting the government's case, then again be discharged while the court heard the usual motions. We submit that such a procedure, far from preventing the error now complained of, would have equally called the jurors' attention to the fact that Denisch was in protective custody.

After the jury was excused defense counsel moved for a mistrial, charging that the marshals had created in the juror's minds an "aura" that Denisch was "still in danger" from the defendants, and that the incident had been deliberately contrived by the government (Tr. 2477-2480). Although the court and the prosecutor agreed that the incident was unfortunate,

neither could accept the charges of evil motive by defense counsel. We submit that no prejudice to petitioners was shown, and that the court properly declined to grant a mistrial.

4. Petitioners next urge that the trial court, in its instructions to the jury, gave unwarranted sanction to the testimony of petitioners' accomplices who testified for the government. In pertinent part, the court charged the jury (Tr. 3559-3560):

> Condon and Denisch are self-confessed criminals, informants and accomplices in the commission of the crimes with which the defendants on trial are charged. An accomplice is one who willfully associates himself with the commission of a crime.
>
> The law does not prohibit the use of self-confessed criminals and whether you approve or disapprove of their use is not to enter into your consideration of this case. In certain types of crime the Government, of necessity, is frequently compelled to rely on the testimony of self-confessed criminals, informants, or accomplices. Otherwise, it would be difficult to detect or prosecute some wrongdoers and this is particularly true in a conspiracy-burglary case. The Government often has no choice in the matter. It must take the witnesses to the transactions as they are.
>
> There is no requirement that the testimony of a self-confessed criminal or accomplice be corroborated by other evidence.
>
> A conviction may rest on the uncorroborated testimony of such witnesses if it is found credible and reliable. The testimony of these witnesses

> may be accepted or rejected in whole or in part as you see fit.
>
> * * * * *
>
> However, the testimony of such witnesses should be viewed with great caution and scrutinized with care, and you should consider their criminal background carefully as bearing on their credibility.

We submit that the jury was properly cautioned as to the potential unreliability of accomplice testimony,[9] that the instruction properly stated the law and met accepted standards on accomplice testimony. See, *e.g.*, *United States* v. *Willis*, 473 F. 2d 450, 454 (C.A. 6); *United States* v. *Curry*, 471 F. 2d 419 (C.A. 5); *United States* v. *Corallo*, 413 F. 2d 1306, 1322-1323 (C.A. 2); *Hanger* v. *United States*, 398 F. 2d 91, 108 (C.A. 8); *cf. Caminetti* v. *United States*, 242 U.S. 470, 495.

5. Petitioners contend that the trial court erred in admitting testimony relating to Denisch's fear for his personal safety and codefendant Bollella's statement to police officers that fear was a reason for his unwillingness to cooperate with the government. These claims have no basis.

Following his arrest and agreement to cooperate with the government, Denisch was placed in the gov-

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[9] Moreover, nearly eight days of trial were consumed by cross-examination of the chief government witnesses (Tr. 747-1454, 1733-2266), in which massive assaults on the witnesses' credibility were undertaken by defense counsel which, we submit, indelibly impressed upon the jury the reasons why the defense urged it to disbelieve their testimony.

ernment's witness security program, and resided in a Topeka, Kansas motel (Tr. 2410-2420). Following an incident in which an individual apparently from New York inquired about his motel room (Tr. 2420-2421), Denisch believed himself in great danger. He contacted a former associate, Joey Brewster, and told him that his agreement to testify for the government had been coerced, that he was prepared to change his testimony, and that he intended to make out a defense of mental incompetency (Tr. 2266, 2419-2426).

Accompanied by Brewster, Denisch and his family returned to New York, where Denisch advised the United States Marshals Service that he had become fearful because of the inadequate protection afforded him in Topeka. Assured of greater security, Denisch decided to continue to cooperate with the government (Tr. 2425-2427).

On cross-examination defense counsel sought to impeach Denisch partly on the basis of his statements to Brewster, a neurologist in Topeka, and an assistant United States Attorney in New York during this period. To meet the impressions created by this cross-examination, the government offered on redirect examination testimony explaining the circumstances under which Denisch had made the foregoing statements (Tr. 2408-2427). The court advised the jury that such testimony was being offered not to prove the truth of what was said, but merely as evidence bearing on the witness's state of mind (Tr. 2417-2419). This was entirely proper in the circumstances.

Petitioners also attack the admission of Detective James Rooney's testimony that codefendant Bollella had told him he had considered cooperating with the government, but had decided against it since "I'd rather be alive in jail than dead on the street" (Tr. 3020). This statement, admitted as part of the government's rebuttal case, was offered to rebut the suggestion, introduced by Bollella in his defense, that the government had attempted to importune him into giving false evidence in support of Denisch and Condon (Tr. 2815-2819, 2826-2840).[10] After extensive colloquy at side bar, the court ruled Rooney's testimony concerning this matter admissible, since the proffered testimony bore directly on the veracity of Bollella's claim that he had refused to cooperate because he would not become "a party to a fabricated case" (Tr. 2981-2993). This, we submit, was within the proper scope of rebuttal, and was properly admitted.

6. Petitioner Fasanella contends that the trial court abused its discretion by limiting his counsel's summation—which followed five separate defense summations which had consumed most of two days of trial—to one and one-quarter hours, since respective counsel for the codefendants had agreed among themselves

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[10] After consulting the court, through counsel, as to the scope of the government's rebuttal case (Tr. 2788-2797, 2805-2811), Bollella testified that he had resisted governmental overtures to cooperate, and that he had stated to Detective Rooney: "Anything that I would have to say in this case would have to be a lie. I know nothing about it. I don't even know the other defendants involved in the case" (Tr. 2841).

that Fasanella's counsel would serve as "anchorman" for all. The argument is without merit.

When on the first day of summations, counsel for petitioner Montello advised the court that "counsel have made some arrangements as to the order of summation" and that he "assume[d] there [would] be no problems as far as anyone is concerned * * * " (Tr. 3091), counsel for Fasanella kept silent. When later that day counsel for petitioner Santa Maria and De Conza also made reference to private discussions among defense counsel (Tr. 3137-3139), Fasanella's attorney once more said nothing about his role as "anchorman." Twice during the colloquy Judge Neaher remarked that he anticipated defense summations to be approximately 45 to 60 minutes each. No objection was made, and thereafter all counsel did in fact limit their summations to not more than one and one-quarter hours each. Throughout this time Fasanella's counsel made no effort to request additional time and said nothing to the court about the purported agreement among counsel. Under these circumstances, petitioner's claim of "surprise" is unfounded, and no complaint should be heard that he was denied a fair opportunity on summation. See *Capriola* v. *United States*, 61 F. 2d 5 (C.A. 7), certiorari denied, 287 U.S. 671. In short, it was not improper for the court to restrict counsel for Fasanella to the same time as was afforded his codefendants' counsel and to the government.

7. Petitioner Montello contends that he was deprived of a fair trial by testimony allegedly elicited

by the prosecutor in order to attack his character, although Montello neither testified nor produced character witnesses.

Two instances of prosecution questioning of Dennis Condon are cited as damaging to Montello. First, Condon testified, over defense objections, that codefendant Bollella was looking for "people who I believed engaged in burglaries" who could open "a safe or a vault" (Tr. 350), and that during one such conversation he had asked Bollella to introduce him to petitioner Montello (Tr. 366, 460-461). This line of testimony was designed to clarify for the jury the relationship among Condon, Bollella, and Montello, and was crucial evidence as to the formation and organization of the conspiracy. That Condon was actively seeking, through Bollella, to engage persons willing to commit burglaries could not have been excluded without emasculating the proof of formation of the conspiracy. See *United States* v. *Pfingst*, 477 F. 2d 177, 194 (C.A. 2), certiorari denied, 412 U.S. 941.

On cross-examination Montello's counsel asked Condon whether at the time of the burglary he considered himself "an honorable man"; Condon replied that he considered himself an "honorable man * * * [or] a reasonable facsimile thereof" (Tr. 1181-1185). On redirect the prosecutor sought to afford Condon an opportunity to clarify his answers. Condon testified (Tr. 1401) that he considered himself a "reliable individual who could be trusted and relied upon by friends" for assistance. The prosecutor sought to elicit by a question that it was Bollella, a friend, who

vouched for Condon to Montello, but a defense objection to the question was sustained and it was withdrawn; the jury was instructed to disregard it (Tr. 1402).

Montello's claim that the question was prejudicial is ill-founded, since from Condon's prior testimony the jury was already aware that Bollella had "vouched for" Condon to Montello (Tr. 460-472). In any event, the instruction was adequate to cleanse from the jurors' minds any prejudicial implications; see, *e.g.*, *United States* v. *Jiminez-Badilla*, 434 F. 2d 170, 174 (C.A. 9).

8. Petitioner Montello contends that the district court erred in ruling that if petitioner testified in his own defense it would not prohibit the use in cross-examination of Montello's prior state conviction for unlawful entry. He urges that the prior offense did not involve moral turpitude and was too remote in time.[11] The contention is insubstantial.

The crime of unlawful entry, a misdemeanor under New York law, does involve moral turpitude. *De*

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[11] The earlier offense occurred in May 1962, nine and one-half years prior to the instant burglary. Petitioner was originally tried and convicted for attempted burglary in the third degree and possession of burglary instruments. Following discovery that some of the jurors had made an unauthorized visit to the scene of the crime, the convictions were reversed. See *People* v. *DeLucia*, 15 N.Y. 2d 294; *United States ex rel. DeLucia* v. *McMann*, 373 F. 2d 759 (C.A. 2); *People* v. *DeLucia*, 20 N.Y. 2d 275. In 1967 Montello pled guilty to the crime of unlawful entry in satisfaction of the outstanding charges against him, and was sentenced to time already served.

*Bernardo* v. *Rogers*, 254 F. 2d 81, 82 (C.A. D.C.). Nor was the conviction too remote. Indeed, as measured by the proposed Rules of Evidence, § 609(b), the conviction fell within the limit of ten years from release from custody or control (in this case, Montello was released from custody or control in December 1967, just four years prior to the offense at bar).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1974.

END OF CASE

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